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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

In re CHRISTOPHER I., et al., Persons
Coming Under the Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

CHUCK I., et al.,

Defendants and Appellants.

B172839
(Los Angeles County
Super. Ct. No. CK 36999)

APPEALS from orders of the Superior Court of Los Angeles County.
Albert J. Garcia, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Karen B. Stalter, under appointment by the Court of Appeal, for Defendant
and Appellant Chuck I.

Mark A. Massey, under appointment by the Court of Appeal, for Defendant
and Appellant Lisa T.

Larry Cory, Assistant County Counsel, and Frank J. DaVanzo, Principal
Deputy County Counsel, for Plaintiff and Respondent.

Mother and father appeal from the order terminating their parental rights to twins Christopher and Alexander, contending the order must be reversed because there was no substantial evidence the twins were adoptable within the meaning of Welfare and Institutions Code section¹ 366.26, subdivision (c)(1). Mother also appeals from the order denying her section 388 petition, contending she showed the changed circumstances necessary to have the twins returned to her custody. We affirm.

FACTUAL AND PROCEDURAL SYNOPSIS

The twins came to the attention of Los Angeles County Department of Children and Family Services (“the Department”) on March 7, 1999, when they and their siblings S. and C.² were taken into protective custody due to allegations of a filthy home, substance abuse by father, and inadequate supervision by both parents. The Department filed a section 300 petition on the twins’ behalf, and the court detained the twins and ordered family reunification services for the parents, including monitored visitation.

In April, the parents pled no contest to the petition as amended. The court declared the twins dependents. The court ordered father to participate in a drug rehabilitation program with random drug testing, parent education counseling, and individual counseling to address proper housekeeping, proper supervision of the children and domestic violence. The court ordered mother to complete parent education, attend conjoint counseling with father, attend individual counseling to address proper housekeeping and proper supervision of the children, domestic violence and compliance with family preservation if the family was eligible for that service.

¹ All statutory references are to the Welfare and Institutions Code.

² When the social worker arrived at the house, the parents were passed out, and S. and C. were found one-half mile away, playing on the street, in traffic. Though mentioned at times, these siblings, as well as a second set of twins born subsequently, are not subject to this appeal. All the siblings were dependents of the court.

In October, the Department reported the twins were in good health and appeared to be developing appropriately. Both twins were attending counseling. The parents were complying with the case plan, but had been arrested for outstanding warrants. The parents completed parent education counseling and were attending Narcotics Anonymous meetings. Father had drug-tested throughout the review period, with one missed test and one dirty test. The parents maintained regular weekly monitored visits with the twins. The Department recommended six more months of services. The court ordered the parents have unmonitored visits and gave the Department discretion to liberalize the visits.

On December 16, the Department reported it was unable to recommend liberalization of the visits due to several missed tests by both parents.

On April 20, 2000, the Department reported the twins had been moved to a new foster home upon turning two years old. The twins adjusted well to the replacement and were developing age appropriately. Although mother denied any drug use, she had tested positive for cocaine. Father also tested positive for cocaine.

Michael Nelson, the parents' counselor, wrote a progress report regarding their progress in parenting and counseling, advising they had not taken their classes seriously as evidenced by their consistent tardiness, sporadic attendance, and failure to cancel scheduled therapy sessions. Nelson had been planning to terminate them, but they had not contacted him. Nelson stated the parents had poor parenting skills in that they did not "provide adequate supervision, teaching, and positive emotional and physical nurturance to their children." Nelson also stated, "they had repeatedly demonstrated poor communication skills between themselves, their children and other people involved in their lives . . . when confronted[,] present as being in denial regarding their dysfunctional behaviors."

An information for the court report indicated the parents had completed their parenting classes, but they did not get along with their therapist and would find a new one. In another information, the social worker noted he could have recommended

termination of reunification services, but he did not do so because the parents had made some progress

On July 25, the court denied the Department's ex-parte application to restrict the parents' visits due to a positive drug test by mother and ordered the Department to file an appropriate petition. The Department then filed a section 388 petition to restrict the visits.

In October, the court granted the section 388 petition as modified and terminated family reunification services and ordered the twins into long-term foster care. The parents were permitted unmonitored visits for a minimum of two hours per week, and the Department was given discretion to liberalize the visits.

On April 4, 2001, the Department reported the parents were consistently visiting the twins and their siblings. The twins had begun weekend and overnight visits with the parents in February. The twins were reported to be physically, emotionally and mentally healthy. A quarterly report from the foster agency indicated the twins had adjusted well to their foster placement. The parents continued to be compliant with the case plan. The Department recommended the twins be transitioned slowly into the parents' home.

At the May 2 contested hearing, the Department continued to recommend the twins not be returned to the parents' custody at that time. The social worker testified the twins were very aggressive with each other upon returning from visits with the parents and would fight, hit and push each other. The parents' live-scan results reflected several outstanding warrants.

The October report indicated the foster parent suspected the twins had speech delays, and a referral was made to the Regional Center. The Department recommended the overnight visits be suspended due to their sibling S.'s aggressive and sexualized behavior.

The November report indicated that the parents were fully compliant with the court orders and that the family had participated in family counseling to address S.'s

aggressive and sexualized behaviors. The therapist observed S. acted appropriately with his younger siblings and did not have any concerns about his interactions with the twins. The court ordered the twins and their siblings be returned to the parents' custody.

On March 11, 2002, the Department filed a section 342 petition alleging father had physically abused the twins and their siblings and all of the children had been exposed to domestic violence between father and mother. The court detained the twins and their siblings and ordered monitored visits for the parents. After a contested hearing, the court dismissed the petition and ordered the twins and their siblings be returned to the parents' custody. The court ordered the family receive six more months of reunification services. This court denied the Department's petition for an extraordinary writ to stay the court's order.

On July 18, the Department filed another section 342 petition on behalf of the twins and their siblings, alleging: physical abuse by the parents; mother's substance abuse, including a positive drug test; inadequate supervision of the children; the parents failed to obtain counseling for all the children; and an unsanitary home environment. The accompanying reports detailed the condition of the home and children, such as each time the social worker visited the living conditions were deplorable and the children slept on bare mattresses and wore dirty clothes. The court detained the children.

The August report stated both parents had tested positive for cocaine. The twins' foster mother reported the boys had engaged in sexualized behavior with each other and used profanity. The foster mother observed Christopher put his face in Alexander's crotch area, and Alexander grab Christopher's head and force it back and forth into his crotch. Christopher pretended to put his penis in Alexander's behind and moved back and forth. The foster mother saw the twins kick each other in their private parts. Based on the foster mother's observations, the Department referred the twins to the Department of Mental Health for developmental assessments.

The court sustained the section 342 petition and continued the matter for a contested disposition.

In October, the Department reported the twins had again been placed in the home of the B.s, their prior foster parents. Mrs. B. stated the twins had been very wild since they had been replaced into her home this second time; initially, Christopher would try to touch Alexander's penis and wanted to play with his own penis, but they had stopped touching each other sexually and were getting better. The twins were attending therapy at school.

The B.s wanted to adopt the twins.³

At the contested hearing on the section 342 petition, the social worker testified it was not a good idea for all six children to be placed together. During sibling visits at the Department office, the children scaled the walls, did not play with each other and were very chaotic and hurtful to one another, and adults had to stop them from hurting each other. The social worker also testified it would not be in the childrens' best interests to be returned to the parents' custody as when the children heard about the parents "their activity level rises and their anxiousness increases. I feel that for their mental health, it would not be an appropriate action for them to have reunification."

The Department reported the B.s still wanted to adopt the twins. The court denied any further reunification services. The court ordered all the children were to be enrolled in therapy and attend conjoint counseling with each other.

The initial section 366.26 hearing was held on April 14, 2003. The Department reported the parents' visits had been sporadic. Alexander did not recognize mother as being his mother, and looked for the foster mother during a visit, calling the foster mother "mommy." The parents were once asked to bring food to the visit because it was scheduled for the dinner hour, but they said that since the children were in foster care,

³ The parents claim the twins' adoption assessments incorrectly stated they did not have any behavioral problems or special needs even though the Department knew of their sexual acting out, delay in language development and stuttering. The assessments mentioned the language and speech problems, but the evaluation of child and likelihood of adoption sections were left blank.

they did not have to provide anything for their children. Also, the parents said the Department should provide all the toys and entertainment during the visits.

The foster mother said that after the visits, the twins would regress and were unable to focus on what was being said to them and would get very aggressive with each other. After visits, the twins cried out in the night and asked to come sleep with her because they had scary dreams. During sibling visits, the twins were more interested in destroying property than visiting, and they had to be put in “time out” again and again.

The twins were doing better in school, were getting along better with their peers, cleaning up after themselves and listening. Christopher’s individual educational plan revealed he had delayed language skills.

A subsequent information for the court indicated the B.s were expressing reservations about adoption because of the age of the foster father and partially “due to the fact that the boys have a great deal of needs and require a great deal of attention.”

In July, the Department reported the B.s had decided against adopting the twins. The Department submitted updated adoption assessments in June which simply stated the twins’ likelihood of adoption was “good.”

At the further section 366.26 hearing on August 11, the Department reported that the twins had completed the Head Start program, but they continued to have problems at school, including aggression toward each other and others. At that time, the Department still had not identified a prospective adoptive family, but opined the twins were “very adoptable.” The parents had not visited from April 3 until July 14.

In September, the Department reported it had located a prospective adoptive home and the prospective adoptive parents had an approved home study.

In December, the Department recommended termination of parental rights. The social worker reported on the parents’ visits with the twins. Mother was observed to be caring and nurturing, but she needed additional skills to discipline the twins. Father appeared to be detached and encouraged aggressive play by throwing plastic balls at the

twins with the intention of hitting them and was very authoritarian in his communication style.

The twins were placed into the home of the S.s, a prospective adoptive family in Victorville with a completed home study. Before taking the twins into their home, the prospective adoptive parents had visited them every weekend since September. The twins stated they were happy in their new placement and did not want to move again and wanted to live with this adoptive family. The twins continued to have problems in school, including aggression toward each other and their peers.

A report about the twins' visit with their brother C. noted that while waiting to see his parents, Christopher stated he missed his foster family, and when the parents arrived, Christopher started throwing and breaking toys, and Alexander joined in. Mother was unable to discipline the twins' behavior. Father, who barely interacted with Christopher and not at all with Alexander, played cards with C. The monitor opined the situation was not safe, the twins did not listen to either parent, were extremely angry, and a good therapist was imperative for them. After the parents left, the twins calmed down and helped the monitor pick up the room.

The Department submitted letters summarizing the mental health services provided to the twins. Both twins had a history of behavioral problems, including poor impulse control, behavioral outbursts, frequent fighting with siblings and peers, difficulty transitioning to new situations, and engaging in sexualized behaviors. In addition, Christopher had difficulty sitting still and speech problems; he formed indiscriminate attachments, feared that something bad would happen to the foster mother, and engaged in bullying behavior. Although Christopher had demonstrated some progress in therapy, he continued to be aggressive with adults, siblings and other children when his needs were not immediately met. Christopher demonstrated similar behavior while attending pre-kindergarten.

Alexander's behavioral problems included lying and hyperactivity. Alexander demonstrated minimal progress in therapy and continued to hit and kick his siblings when

he became upset or his demands were not immediately met. Alexander was more hyperactive than his peers, and he became defiant with his teacher in a group setting. Alexander appeared excited about moving to the prospective adoptive home.

The twins' therapist opined their prognosis was good if they continued to attend counseling and received constant praise for their efforts, were in a stable and nurturing environment, and the foster family became involved in family therapy.

The court set the matter for a contested section 366.26 hearing and ordered the parents have monitored visits of three hours, three times a week.

On January 27, 2004, mother filed a section 388 petition seeking the return of the twins to her custody. Subsequently, mother filed another section 388 petition asking the court to order the Department not to unreasonably interfere with visitation. After an evidentiary hearing, the court denied the petitions. The court was skeptical about mother's claim to have separated from father, noting that there was no evidence supporting that claim and that mother had not proved she had completed any program. The court stated mother's brief period of testing did not demonstrate her rehabilitation.

Attached to the Department's supplemental report was an account of a visit with mother. The twins' behavior was so extreme that the office where the visit had been held was not available for future visits. When the twins went out of control, mother resorted to demeaning language to shame them into obedience. The adoptive parents observed the twins regressed in their behavior after visits, displaying aggressive behavior toward each other, as well as sexually acting out and increasing the vulgarity of their speech. The entire staff of the office had to be involved because of the ineffective parenting skills of the parents. When a female staff member entered the room to assist mother, mother became enraged and stormed out of the room, saying she was going to call her attorney.

A letter from the director of the foster family agency indicated the twins' behavior during and after visits with the parents decompensated to the point the twins became aggressive and hurtful. The letter noted the S.s were willing to adopt the twins, but were

very frustrated by the current situation, noting “the emotional roller coaster of the past few weeks has put the placement in jeopardy.”

The twins’ school reports indicated they were displaying behavioral problems. In particular, the twins’ teachers observed they displayed a degree of anger and frustration on a regular basis, which seemed to be heightened on the days following parental visits.

The social worker testified she had no doubt as to the twins’ adoptability, the parents had not visited consistently, and the adoptive parents wanted to adopt the twins.

The court found by clear and convincing evidence that the twins were adoptable and that there was no applicable exception to termination of parental rights in that the parents had a dismal record of visitation with the twins and the relationship between the parents and the twins did not rise to the level of a parent-child relationship. The court then terminated parental rights.

Father and mother filed a timely notice of appeal from the order terminating parental rights. Mother subsequently filed a timely notice of appeal from the order denying her section 388 petitions.

DISCUSSION

I. Section 388 Petition

A. Evidence

In her first petition, mother alleged she had completed all aspects of the court’s counseling orders, had been drug testing clean, she and father had separated, and the twins desired to live with her. Mother attached tests showing she had tested clean on December 30, 2003, and January 8 and 16, 2004.

At the hearing, the social worker testified mother had been drug testing for a few months with clean results. The social worker was not aware of any counseling in which mother had participated.

Mother called Dan Maynard, a chaplain for the Los Angeles Police Department and a certified drug and alcohol abuse counselor. Maynard had been a counselor for 28 years and had counseled thousands of people. Maynard had known mother for two years and counseled her for six to nine months, and they had dealt extensively with the removal of her children and her drug abuse issues. Maynard believed mother had made a “complete change” since he had begun counseling her. Mother had continued in an aftercare drug program on a weekly basis during the preceding nine months.

Mother called Janet who had recently monitored mother’s visits with the twins. Janet said the twins were happy to see mother, and when the visits ended, the twins hugged and kissed mother.

Mother testified she had completed parenting, done individual counseling and conjoint counseling with father, and gone to Narcotics Anonymous weekly meetings. Mother called the twins once a day and had been drug testing with no positive tests. Mother now took more responsibility than when the twins had been removed and her whole outlook on life had changed.

B. Changed Circumstance

Mother contends the court abused its discretion when it denied her section 388 petition to return the twins to her because she demonstrated she had overcome her drug addiction and it was in the twins’ best interests as they were not adoptable children.⁴

“Modification orders in juvenile dependency court are authorized by section 388. Essentially, the statute requires a showing of a change of circumstances and that modification based on that change would be in the ‘best interests’ of the minor children.” (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 526.) The change of circumstances or

⁴ Mother does not appeal from the denial of her second section 388 petition.

new evidence must be of a “significant nature.” (*In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1451.)

At a section 388 hearing, “the burden of proof is on the moving party to show by a preponderance of the evidence that there is new evidence or that there are changed circumstances that make a change of placement in the best interests of the child.” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) “After the termination of reunification services, the parents’ interest in the care, custody and companionship of the child are no longer paramount. Rather at this point ‘the focus shifts to the needs of the child for permanency and stability.’” (*Ibid.*)

The juvenile court has extensive discretion in deciding what will be in the best interests of a child, and its discretion will not be reversed save for a clear abuse of that discretion. (See *In re Eric B.* (1987) 189 Cal.App.3d 996, 1005.)

Mother argues that unlike the parent in *In re Angel B.* (2002) 97 Cal.App.4th 454, 465, in which the juvenile court had summarily denied a section 388 petition, she demonstrated she had overcome her drug addiction by presenting her counselor’s testimony about her participation and progress in drug counseling and her own testimony she had tested clean for a couple of months. Moreover, mother asserts the twins’ behavior during visits did not demonstrate her ineffective parenting skills, but the twins inability to be controlled.

Although mother testified she had tested clean for a couple of months, she only adduced proof of three clean tests in less than a month. Even though Maynard testified mother was in an aftercare program, as noted by the court, neither he nor mother testified she had completed a court-approved drug program. Maynard was not a Department-approved counselor. Given mother’s history of substance abuse and positive tests, her recent progress was not a significant change of circumstance at that point in the proceedings and did not demonstrate mother had overcome her drug addiction on other than a temporary basis.

The court found mother had failed to show it was in the best interests of the twins to grant the petition. The record is replete with examples of mother's inability to use whatever parenting skills she had acquired to discipline and control the twins, who regressed and acted out after visits with mother. The twins were in a prospective adoptive home. In addition, mother filed her section 388 petition the day before the section 366.26 hearing was to be held, and, at most, the petition showed changing circumstances rather than changed circumstances. (See *In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.)

Accordingly, the court did not abuse its discretion when it denied the petition.

II. Adoptability⁵

The parents contend the court did not have substantial evidence the twins were adoptable because they had a history of behavioral problems; the Department submitted incomplete and inaccurate adoption assessments;⁶ the twins had resided with the prospective adoptive parents for only two months, an insufficient time to determine the appropriateness of their placement; and even though the previous prospective adoptive parents had initially desired to adopt the twins, they decided against adoption due to concerns about the twins' many needs, which required a great deal of attention.

"We review the factual basis of a termination order to determine whether the record contains substantial evidence from which a reasonable trier of fact could find a factual basis for termination by clear and convincing evidence." (*In re Baby Boy L.*, *supra*, 24 Cal.App.4th at p. 610.) "If there is any substantial evidence to support the

⁵ Mother joins in father's argument on this issue.

⁶ Father waived the alleged deficiency of the adoption assessments by not objecting below. (*In re Aaron B.* (1996) 46 Cal.App.4th 843, 846.) The question is whether the record as a whole indicates a child is adoptable. (See *In re Dakota S.* (2000) 85 Cal.App.4th 494, 503.)

findings of the juvenile court, a reviewing court must uphold the trial court's findings. All reasonable inferences must be in support of the findings and the record must be viewed in the light most favorable to the juvenile court's order.'" (*In re Babilio T.* (1992) 4 Cal.App.4th 155, 168.) We "must uphold the trial court's findings unless it can be said that no rational factfinder could reach the same conclusion." (*In re Heather B.* (1992) 9 Cal.App.4th 535, 563.)

"The issue of adoptability posed in a section 366.26 hearing focuses on the minor, e.g., whether the minor's age, physical condition, and emotional state make it difficult to find a person willing to adopt the minor. Hence, it is not necessary that the minor already be in a potential adoptive home or that there be a proposed adoptive parent 'waiting in the wings.'" (Citations & italics omitted.) (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.)

"Usually, the fact that a prospective adoptive parent has expressed interest in adopting the minor is evidence that the minor's age, physical condition, mental state, and other matters relating to the child are not likely to dissuade individuals from adopting the minor. In other words, a prospective adoptive parent's willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent *or by some other family.*" (Original emphasis.) (*In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154.)

"We recognize that in some cases a minor who ordinarily might be considered unadoptable due to age, poor physical health, physical disability, or emotional instability is nonetheless likely to be adopted because a prospective adoptive family has been identified as willing to adopt the child. Where the social worker opines that the minor is likely to be adopted based solely on the existence of a prospective adoptive parent who is willing to adopt the minor, an inquiry may be made into whether there is any legal impediment to adoption by that parent In such cases, the existence of one of these legal impediments to adoption is relevant because the legal impediment would preclude

the very basis upon which the social worker formed the opinion that the minor is likely to be adopted.” (*In re Sarah M.*, *supra*, 22 Cal.App.4th at p. 1650.)

In the instant case, the primary negative factor in the twins’ lives was their contact with their parents. The twins acted out and regressed after visits with the parents. However the evidence indicated the twins’ behavior was improving. Even after reunification services, when the twins were returned to the parents’ custody, the parents were not able to maintain that custody. The twins’ therapist opined their prognosis was good if they continued to attend counseling and received constant praise for their efforts, were in a stable and nurturing environment, and the foster family became involved in family therapy. Although the B.s had decided against adopting the twins, the decision had as much to do with the age of the foster father as with the twins’ behavioral problems. Mrs. B. had stated that despite the acting out, the twins were getting better. There were no legal impediments to the S.s’ adopting the twins.

At the time of the section 366.26 hearing, the twins were almost six years old. (§ 366.26, subd. (c)(3) [over seven deemed hard to adopt].) Although the twins had behavioral problems and some speech and language problems, they had no physical or mental disabilities. As reflected in the reports detailed in the synopsis, the court and the prospective adoptive family were familiar with the twins’ needs and problems. The adoptive family wanted to adopt the twins anyway, and the twins wanted permanency. Thus, there was substantial evidence the twins were adoptable.

DISPOSITION

The orders are affirmed.

WOODS, J.

We concur:

PERLUSS, P.J.

ZELON, J.